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No. 667

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1962

WILLIAM SMITH, JR. — Petitioner

vs.

STATE OF MISSISSIPPI — Respondent

BRIEF FOR RESPONDENT

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No. 667

WILLIAM SMITH, JR. ..... Petitioner

vs.

STATE OF MISSISSIPPI ..... Respondent

BRIEF FOR RESPONDENT

STATEMENT OF FACTS

The guilt or innocence of petitioner is not seriously questioned on this appeal. The proof of guilt is overwhelming. About midnight of the night of Saturday, July 30, 1961, Aleece Gober and James Myers, ages 14 and 17 respectively, were seated in a car listening to the radio on a rural road out from the Town of Canton in Madison County, Mississippi when appellant's presence was first noted by the odor of whiskey. They had not heard him because of the radio. After noticing the smell of whiskey, a Negro man with a goatee appeared on the righthand side of the car and at the point of a knife robbed the boy of his wallet and watch. The girl had no money. Petitioner got into the car with the knife first on the boy's throat and then on the girl's and forced them to drive to an even more remote spot at the edge of a corn field. They were then ordered through a barbed wire fence and out into the field. Petitioner told the girl, * * * "Since they didn't have no money, I would 'take pay out on her'." He then forced them back into the

car and told them they could find the keys to the car at a fork in the road. The boy and girl then made their way across a field to the home of a Mr. Craft, where the boy telephoned home and the Sheriff was called. The clothes of both the boy and girl were bloody and a cloth was wrapped around the girl's hand where it had been cut by petitioner's knife in resisting him. The girl was immediately taken to a hospital in Canton where a doctor examined her. It was the doctor's definite conclusion from bruises and a ruptured hymen, plus the presence of male sperm, that she had undergone very recent forcible intercourse. Examination indicated no previous intercourse.

By about 4:30 A.M. officers, including a Canton police officer with a police dog, picked up petitioner's scent where the keys had been left in the road and followed his trail to his home where he was taken into custody. Later in the day appellant and several others were one by one interviewed in the hearing of the boy and girl and he was identified by his voice. That afternoon he was taken from the jail in Canton to the Headquarters of the Mississippi Highway Safety Patrol, a distance of about twenty miles, where he was confronted by James Matlock. Matlock and petitioner were together immediately prior to the commission of this crime and Matlock had let petitioner out of his car to go rob this young couple. He was to receive part of the proceeds of the robbery. Matlock implicated petitioner and petitioner was also given a polygraph test. Upon being advised of his implication by Matlock and that the polygraph indicated he was lying, petitioner admitted his guilt, detailed his whole course of action, took the officers to his home (they obtained a search warrant first) and directed them to the hiding place of the knife used, the watch taken from

the Myers' boy and the pants worn by petitioner at the time of the rape. A pubic hair taken from the zipper of these pants was sent to the F B I Laboratory where it was compared with a sample from the person of the girl. The examining agent testified at the trial as to the similarity of the hairs in color and other characteristics.

Petitioner's confession, which was transcribed by investigating officers and signed by him, is contained in a box of exhibits transmitted to this Court along with the trial transcript.

ARGUMENT

RIGHT OF COUNSEL

A. AT TIME OF ARREST.

There is no authority cited by petitioner nor found by this writer which requires appointment of counsel or access to counsel immediately upon an arrest and prior to a confession. A confession is not a pre-trial proceeding requiring assistance of counsel. Petitioner, prior to confession, was advised of his right to counsel but he did not request counsel. Even had he requested counsel, there is not necessarily a violation of due process. Speaking for this Court in *Cicenia vs. LaGay*, 357 U.S. 504, Mr. Justice Harlan, in weighing the right to counsel on one hand and an unreasonable constriction on state police activities which would impair their ability to solve difficult cases, reaffirmed *Crooker vs. California*, 357 U.S. 433, that, in judging whether state prosecutions meet the requirements of due process, this Court has sought to achieve, not a strict formula, but to determine from all the circumstances whether a conviction was attended by fundamental fairness or unfairness. There is nothing in this record to indicate that petitioner was subjected

to the "inquisition" that he would lead this Court to find, nor that his interrogation was unreasonably prolonged, nor that "during this entire period he existed in terror of mob violence." While a certain latitude and license may be enjoyed by counsel in pleading his case, it is respectfully submitted that none of these things existed, nor are they reflected or even intimated by the record.

Furthermore, appellant was not alone at the time of his confession, but was accompanied by his good friend and companion of the night before, James Matlock, who was instrumental in the procurement of the confession by his accusation of petitioner.

B. AT THE TIME OF THE PRELIMINARY HEARING.

The record in this case is entirely silent with respect to a preliminary hearing. Therefore, without a separate evidentiary hearing, this Court will never know whether or not petitioner had counsel when he waived a preliminary hearing. This writer cannot conceive of this Court determining as a fact that petitioner was without counsel when he waived preliminary hearing by mere reference in petitioner's brief to an item in the Madison County Herald, a newspaper published at Canton, Mississippi, which allegedly published as a fact that petitioner had waived examination, but so far as can be told from the brief reference, makes no mention of whether or not he had counsel.

Even so, the mere waiver of a preliminary hearing could not have been prejudicial to petitioner's rights, since he is not called upon to divulge anything prejudicial and, rape being a capital offense in Mississippi, no question of his right to bail could have been resolved at such a hearing. A preliminary hearing in Mississippi is not

like an arraignment and, consequently, *Hamilton vs. Alabama*, 368 U.S. 52, does not apply. While Mississippi law requires the taking of an offender before a proper officer without unnecessary delay, Mississippi Code of 1942, Recompiled, Section 2473; such requirement is to prevent unreasonably long detentions before making a charge, *Sheffield vs. State*, (Miss.) 28 So. 2d 745, yet such a preliminary hearing is not a prerequisite to the validity of a criminal trial and prosecution. *Conn vs. State*, (Miss.) 105 So. 2d 760.

It cannot be said from the record in this case that the absence of counsel, if a fact, at the preliminary hearing, if there was one, in any respect made his subsequent trial an unfair one. The converse may have been true had all the sordid details of this crime been aired to the public as a preview of what was to come later at the subsequent term of the Circuit Court.

C. THE EFFECTIVENESS OF COURT-APPOINTED COUNSEL. THE NEED TO LOOK BEYOND THE RECORD.

Petitioner questions the effectiveness of his Court-appointed counsel, one of the most experienced and successful lawyers in the defense of criminal cases in Madison County, Mississippi. In his petition for certiorari herein, petitioner recognizes that the Court-appointed counsel was "an experienced trial attorney." While recognizing that the Court appointed an experienced trial attorney, he would now, by affidavits attached to his brief, have this Court believe that the attorney, either through purpose or dereliction, failed to adequately investigate the case and properly represent him. In the absence of any evidence to the contrary, attorneys are presumed to have sufficient skill and learning to defend

an accused adequately. *Wooddell vs. State*, (Md.) 162 A 2d 468; *State vs. Griffith*, (Wash.) 328 P 2d 897. In spite of the allegations of the petition herein, considering the nature of this case and the discretion of counsel in his trial tactics, the record reflects that petitioner was adequately defended. Cf. *State vs. Graeber*, (Wash.) 283 P 2d 974, cert. den., 350 U.S. 938, cert. den., 351 U.S. 970.

No two lawyers will defend a case alike. Petitioner recognizes his counsel as an experienced trial attorney and, therefore, the presumption is that his tactics and strategy at the trial were such as in his own mind best calculated to elicit some degree of sympathy from the jury and save his client from the death penalty. Any jury would have found petitioner guilty and his only hope was to receive a life sentence rather than death.

Practically all of petitioner's argument on this appeal is predicated upon so-called affidavits attached as an appendix to his brief. These affidavits have no place before this Court. In *Hopt vs. Utah*, 114 U.S. 488, a similar thing was done and this Court held that the lawfulness of the conviction and sentence of a person accused of crime is to be determined by the formal record, made up and transmitted as required by law, of what was done in his presence at the trial in open court and that ex parte affidavits concerning events, taken since the entry of the case in the Supreme Court, cannot be considered.

However, inasmuch as these affidavits were attached to petitioner's brief, the Court's attention is directed to the fact that four of them are not sworn to but merely have a certificate by a notary public to the effect that they were signed in his presence. Therefore, they do not even have the status of an affidavit. As to the affidavit by William L. Higgs, while he is counsel of record in this

case, by attaching his affidavit he has also attempted to become a witness before this Court. Having become a witness, it was felt necessary to answer the scurrilous charge made against Circuit Judge L. F. Hendrick, one of the most respected judges in the South, a man of the highest personal and judicial integrity, and to that end there is attached as an appendix to this brief an affidavit by Judge Hendrick relating the true facts with respect to Mr. Higgs' telephonic communication with him. For the further information of the Court as it relates to the credibility of Mr. Higgs, there are attached hereto certified copies of a criminal affidavit and judgment of conviction of Mr. Higgs in the County Court of Hinds County, Mississippi showing him to have been charged and convicted of contributing to the delinquency of a minor by acts of sodomy and other sexual perversion, since which time he has been a fugitive from justice. In addition, a committee of the Bar Association is now preparing to institute disbarment proceedings against him.

1. THE MEANING OF EFFECTIVENESS.

(a) COUNSEL MOST LIKELY TO BE EFFECTIVE IS COUNSEL OF ONES OWN CHOICE.

The State of Mississippi has no argument with this principle. Anyone is entitled to counsel of his own choice if he is in a position to employ him. Not having been advised that Mr. Higgs was representing petitioner, at the earliest opportunity afforded him, the Court appointed an experienced trial lawyer to represent him. It is difficult to determine by what standards petitioner would have this Court judge the effectiveness of Court-appointed counsel. In his own affidavit, Mr. Higgs, one of petitioner's counsel, stated under oath that "Smith also requested me to represent him when I first saw him

and talked to him in the Hinds County Jail in Jackson, Mississippi." Where was Mr. Higgs between that time and the time Circuit Court convened in Madison County, Mississippi? If that is a true statement, the only conclusion that can be drawn is that he made a careful investigation of petitioner's case and came to the same conclusion as did Court-appointed counsel.

(b) AS TO COUNSEL'S INVESTIGATION OF THE CASE.

(c) AS TO THE QUALITY OF THE INVESTIGATION.

As in *Avery vs. Alabama,* 308 U.S. 444, cited by petitioner, there is nothing in this record to indicate how long Court-appointed counsel consulted with petitioner, what investigation he made, what he found, and "its every angle is illuminated by the absence of any indication * * * that they (he) could have done more had additional time been granted."

Here again this Court will only consider the record in this case and not the matters and things alleged in the affidavits attached to petitioner's brief.

(d) COUNSEL'S TACTICS AT THE TRIAL.

For obvious reasons, a large amount of discretion must be given counsel while conducting a trial and courts are reluctant to find an abuse of that discretion. This principle is admitted by petitioner and stated in his brief. *Brubaker vs. Dickson,* 310 Fed. 2d 30, is ample authority for denial of relief by this Court. Brubaker was a habeas corpus case, as this should be. As stated in Brubaker, when inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record. Where the trial counsel consulted suffici-

ently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choices of trial facts and strategy. There is no denying that petitioner should be afforded an opportunity to support his allegations by proper proof, if he can make it, in an evidentiary proceeding in an evidentiary court, not in the Supreme Court. This Court cannot determine the truth or falsity of the allegations of the affidavits attached to petitioner's brief nor of the ex parte statements of counsel in their argument. That can only be done in an evidentiary proceeding where the witnesses, under oath, would be subjected to cross-examination.

2. PETITIONER'S PARTICULAR NEED FOR EFFECTIVE COUNSEL.

There is no denying that petitioner needed effective counsel. For that reason the trial court appointed an experienced trial lawyer who, according to the affidavit of Judge L. F. Hendrick attached hereto, is one of the most successful lawyers in criminal cases in that section of the State of Mississippi involved. Counsel for petitioner has failed to show, except by the so-called affidavits, which will not be considered by this Court, that any other counsel could have obtained a different result.

Counsel for petitioner would have this Court take judicial notice of the alleged fact that the State of Mississippi was, at the time of the trial, a hot bed of hostility to Negroes. It is submitted with deference but in all candor that such a statement has no place in this brief or in any other document submitted to this or any other court. First, we respectfully point out that such a statement is untrue. There has never existed in Mississippi

any hostility on the part of the general populace thereof toward Negroes or toward the members of any race of people. This writer as a representative of the people of Mississippi expresses to the Court his personal resentment toward the statement of the petitioner. It is done with full realization that personal sentiments have no place in a legal brief before this Court but, because of the charge made against the people of Mississippi, the writer feels that he is compelled to refute the same.

Secondly, it is respectfully pointed out that the record contains not the slightest scintilla of evidence that Mississippi was, at the time of the trial or at any other time, a "hot bed of hostility to Negroes." Petitioner has not cited any authority that this Court or any other Court may at any time take judicial notice of the attitude of the people on any particular question. While it is not asked to be taken as evidence by this Court, it was necessary to attach hereto the affidavit of Circuit Judge L. F. Hendrick to refute the charge of William L. Higgs. The affidavit of Judge Hendrick states that the atmosphere in Canton was not emotion-charged. This is the only credible statement anywhere in this record or in the briefs on this subject.

3. AS TO COUNSEL'S CONDUCT AND HIS EFFECTIVENESS.

Hereunder in five separate categories petitioner argues that Court-appointed counsel neglected his constitutional responsibilities.

(a) COUNSEL WAS GIVEN TOO LITTLE TIME IN WHICH TO PROPERLY PREPARE A DEFENSE IN A CAPITAL CASE.

This Court should bear in mind that, while this was a most serious case, it is not the type of case which would

be at all difficult to investigate, nor would a great deal of time be necessary to throughly investigate it. Witnesses were few. In a day's time counsel could have interviewed all of them. They were all in the same community or only twenty miles away at the Mississippi State Highway Patrol Headquarters. An attorney of the experience of Court-appointed counsel in this case would certainly have moved for a continuance had he not been satisfied that his investigation was thorough. Furthermore, the trial court would certainly have granted a continuance on any reasonable showing. This writer is hesitant to make a statement of fact not in the transcribed record in this case, but in view of the manner in which petitioner states his argument, it must be said that Canton, Mississippi is a relatively small town and that the rest of Madison County is almost entirely rural. To say that counsel could not have investigated this case in the time he had but should have moved for a continuance is a conclusion not based upon any facts revealed by the record and there is certainly no precedent from this or any other court laying down any hard and fast rule as to how long counsel must be allowed to make his investigation. This Court recognized just such a situation in *Avery vs. Alabama*, 308 U.S. 444, 452, wherein this Court recognized that, unlike metropolitan centers, people in such rural counties know each other, and information concerning witnesses and events is more widespread and more generally known than in large cities, enabling attorneys to make their inquiries in much less time.

(b) AS TO COUNSEL'S FAILURE TO CONFER WITH ALLEGED VITAL WITNESSES.

This argument is predicated entirely upon the "affidavits" of Mrs. Smith, Julia Mae Jones and Rosetta Body. As pointed out hereinabove, these are not affi-

davits. They are not sworn to, the allegations therein were not before the trial court and they have no place in petitioner's brief. Under *Hopt vs. Utah*, 114 U.S. 488, supra, they will not be considered by this Court in disposing of this case. As with the other affidavits attached to petitioner's brief, the State of Mississippi has not had the privilege of cross-examining the affiants nor of producing witnesses to contradict them. If these witnesses are willing to make the same statements under oath, there is a forum afforded petitioner and a remedy by petition for writ of habeas corpus in the United States District Court.

(c) AS TO COUNSEL'S FAILURE TO MOVE FOR A CHANGE OF VENUE.

Hereunder it is argued that ill will existed in Madison County against petitioner at the time of his trial, yet petitioner does not make any reference to the record where such evidence can be found. Once again petitioner refers to certain news items in Jackson, Mississippi newspapers and the Madison County Herald, quoting from the latter to the effect that at the time petitioner waived a preliminary examination the courthouse was cleared of spectators and afterwards petitioner and his companion of the night, James Matlock, were returned to an undisclosed jail. There are no sinister implications from these facts, if they are facts. It is the common practice, out of deference to the prosecutrix in Mississippi to clear the courtroom of all persons except such as are necessary in the conduct of the trial. This is not only the practice in Mississippi but authorized by Section 26 of the Mississippi Constitution of 1890.

Petitioner also attempts to make capital of the fact that on the day after his arrest, on motion of the District

Attorney, petitioner was ordered transferred from the Madison County, Mississippi Jail to the Jail in the First Judicial District of Hinds County, Mississippi (Jackson). Section 2499, Mississippi Code of 1942, Recompiled, provides for such removal, if, in the opinion of the judge, the county jail is insufficient for the safekeeping of the prisoner. The conclusion argued by petitioner and the inference therefrom which this Court might draw is that petitioner was moved to avoid mob violence. Nothing could be further from the truth. Such argument again puts this writer in the regrettable position of having to make a statement of fact which does not appear in the record. Removal of prisoners under the last quoted statute is a common practice in Mississippi where counties like Madison, in which this crime was committed, have no jail or have a jail which is so old and ill equipped as not to be a fit place to keep a prisoner for any length of time. Had any such point been raised in the trial court or should it be raised in any evidentiary proceeding in connection with this case, the proof would show that the jail in Madison County is so old and ill equipped that it is not suitable and is not a fit place to keep any prisoner for any length of time. For many years every non-bailable accused or convict has been transferred from the Madison County Jail to the Hinds County Jail and the fact of such transfer of petitioner cannot in any way lend any credence to his contradicted testimony that he was threatened with return to Madison County where a mob could get him.

(d) AS TO COUNSEL'S FAILURE TO INQUIRE WHETHER NEGROES WERE SYSTMATICALLY EXCLUDED FROM THE GRAND JURY AND THE PETIT JURY.

Here again petitioner makes the bald accusation that his Court-appointed counsel "made no investigation of the possibility of systematic exclusion of Negroes from the juries." This may very well be true. However, there is a very good answer to why counsel may have made no such investigation, but this answer involved further statement of facts by this writer which have no place in this brief but which must be made in view of petitioner's charge against trial counsel. A Negro defendant in Mississippi need not resort to the Federal Courts for relief when members of his race have been systematically excluded from jury service. The earliest Mississippi case is *Farrow vs. State*, (Miss.) 45 So. 619. The latest is *Gordon vs. State*, (Miss.), 140 So. 2d 88. However, it is a matter of common knowledge now that the members of the Board of Supervisors in most, if not all, of the counties of this State have been placing the names of Negroes in the jury boxes each year, such of those who meet the requirements of being men of good intelligence, sound judgment and fair character and who do not possess the disqualifications enumerated in Section 1762 of the Mississippi Code of 1942, Recompiled, as to who are competent jurors. *Cameron vs. State*, (Miss.) 102 So. 2d 355.

The State of Mississippi is prepared to prove in a proper evidentiary proceeding in any court that there were Negroes not only on the grand jury which indicted petitioner but on the special venire drawn at his request.

Petitioner's counsel knew this and, therefore, he was not called upon to make any further investigation.

(e) AS TO COUNSEL'S EXAMINATION OF THE STATE'S WITNESSES.

Court-appointed counsel is criticized for his alleged failure to cross-examine the prosecutrix and his brief cross-examination of her companion.

Any lawyer with any trial experience in cases of this kind (and we believe there will be unanimity among this Court on this proposition) will readily recognize the danger in a vigorous cross-examination of the victim of a rape, particularly where she is a fourteen year old girl, her companion is a boy of seventeen years, there is no suggestion of a possible element of consent and absolutely nothing that could be developed by a vigorous cross-examination. To subject this girl and her young companion to the vigorous and pitiless cross-examination which petitioner now urges should have been made would certainly have prejudiced petitioner's case in the minds of the jury. In such cases it is always the better strategy to appear sympathetic and hope to get a life sentence. Petitioner argues that there was much to be inquired about, but does not set out what these thihgs might have been.

II.

THE CONFESSION

A.

THE CONFESSION WAS NOT THE FRUIT OF AN ILLEGAL ARREST.

Petitioner was not the victim of a "dragnet." As with the other points raised by petitioner, his argument with respect to the legality of the arrest is predicated upon conjecture and not upon the record. The only testimony in the record with respect to the arrest of petitioner is

that of the Sheriff (R. 16). Patrolman Hill, a Canton policeman, arrived with his dog at the spot where petitioner had left the car keys. The dog "took the track" and led the officers to petitioner. Other details of the arrest and other evidence of probable cause is not to be found in the record since the validity of the arrest was never questioned at the trial. In any event, in the absence of an applicable Federal statute (there is none here) the law of Mississippi determines the validity of the arrest. *United States vs. Di Ri*, 332 U.S. 581. Under Mississippi law evidence of tracking by trained dogs is admissible, and, being admissible, it certainly amounts to probable cause to make an arrest. *Hinton vs. State*, 166 So. 762. It is true that the Hinton case requires, when the question is raised properly, that there be proof that the dogs were reliable on trail and tested by tracking human beings and it goes without saying that, had the reliability of Patrolman Hill's dog been put in issue, such proof would have been forthcoming. Once again, Court-appointed counsel, being a resident of Canton, Mississippi, undoubtedly knew Patrolman Hill and his dog well and did not there question the reliability of the dog for fear of emphasizing the dog's reliability before the jury.

B.

THE CONFESSION WAS NOT OBTAINED DURING A PERIOD OF UNCONSTITUTIONAL DETENTION.

While Mississippi law requires the taking of an arrested person before a magistrate without unnecessary delay, Mississippi Code of 1942, Recompiled, Section 2473, a failure to do so, taken alone, will not invalidate a confession. *Winston et al vs. State*, (Miss.) 48 So. 2d 513; *Conn vs. State*, (Miss.) 105 So. 2d 760.

Even if this Court was inclined to extend the McNabb-Mallory rule to the States, this is not a case in which it can be done. Petitioner was arrested, interrogated and confessed on Sunday. Had the issue been raised at the trial, petitioner would have had the burden of proving that a magistrate was available on Sunday in order to bring a confession obtained that day within the rule. *United States vs. Walker*, (1949) CA 2d NY, 176 Fed. 2d 564, cert. den. 338 U.S. 891. Also, in *Robinson vs. State*, (Miss.) 77 So. 2d 265, cert. den. 350 U.S. 851, the arrest was on Sunday morning, on which day neither the grand jury nor a justice of the peace court was in session, and it was held that there was no illegal detention resulting in the confession that same Sunday afternoon.

C.

PETITIONER'S CONVICTION WAS NOT BASED ON AN INVOLUNTARY CONFESSION.

It is respectfully submitted that the "totality of circumstances" leading up to and surrounding petitioner's confession clearly demonstrates that it was a voluntary one.

(a) THE PETITIONER.

Petitioner cites no authority and will find none that a twenty-five year old Negro farm hand, who had attended school only to the second grade, is not capable of giving a perfectly voluntary confession. Petitioner is here adopting the same line that his Court-appointed counsel adopted in his argument before the Supreme Court of Mississippi and undoubtedly before the jury at the trial and on account of which petitioner is critical of Court-appointed counsel. Petitioner's guilt is so overwhelming that his counsel attempted to influence the

Mississippi Court by describing petitioner as "an uneducated, superstitious" Negro who "worshiped at the shrine of sorcery, voodoo and witchcraft, and who was easily influenced by anything smacking of the supernatural." This was a fair and good argument in an effort to convince the Mississippi Court that petitioner was overawed and influenced by the polygraph. How can petitioner criticize Court-appointed counsel when he is attempting to influence this Court by the very same argument?

(b) POLICE PRESSURE PRIOR TO PETITIONER'S CONFESSION.

Here again petitioner takes liberties with the record in this case with the statement that petitioner was illegally arrested without a warrant or probable cause. No such thing is reflected by the record. As pointed out hereinabove, the only evidence in the record on the question of the legality of his arrest is the evidence that the police dog trailed petitioner from where he left the keys to his house. If that is not sufficient probable cause, then the question of the legality of his arrest is still an open one and can only be explored in an evidentiary proceeding.

Nor is there anything in this record to indicate that petitioner was "continually questioned" nor "forcibly subjected" to a polygraph test. That these assertions are false is readily reflected by the record. It should be obvious to this Court that no one can be forced to take a polygraph test. A high degree of cooperation is absolutely essential. As to the interrogation, the record only reflects that petitioner, along with others, was interrogated in Canton in the hearing of the prosecutrix and the boy involved and that he was later that afternoon inter-

rogated at the office of the Mississippi State Highway Patrol.

(c) POLICE PRESSURE AFTER THE CONFESSION.

If there was any pressure of mistreatment of petitioner after he had confessed, it is not reflected by the record. Any such argument must necessarily be predicated upon the so-called affidavits attached to petitioner's brief which, as hereinabove pointed out, have no place in the brief, are not sworn to, and will not be considered by this Court.

A most comprehensive history and critique of this Court's decisions is the article by Wilfred J. Ritz in Volume XIX, No. 1, Washington and Lee Law Review, entitled Twenty-Five Years of State Criminal Confession Cases in the U. S. Supreme Court. As the author pointed out, there is no body of present law determining precisely what is illegal police conduct in obtaining confessions. Petitioner cites no authority condemning the use of a polygraph as an aid to a police investigation. It is a well known fact that practically all criminals who confess later repudiate the confessions or make the claim that they were induced through fear, duress, promise, etc. By whatever standards this Court judges this case, whether it looks to the "totality of circumstances", the "total facts" or the "badge of coercion" referred to by Mr. Ritz, it is earnestly believed that this Court will find from the record that the trial judge was correct in adjudging that, as a matter of both law and fact, petitioner's confession was a voluntary one. Petitioner's guilt is otherwise shown and the guilt of an accused is always of compelling relevancy to the question of whether or not the police methods in fact caused the accused to

confess, or whether the confession was a voluntary product of his guilt.

D.

THE JURY WAS NOT MISDIRECTED BY WRONG CONSTITUTIONAL STANDARDS.

It is respectfully submitted that, while the instruction complained of may be subject to some criticism for its wording, it is a fundamental rule of appellate practice in Mississippi that a defendant cannot complain on appeal of an instruction which he himself obtained. *Williams vs. State*, (Miss.) 49 So. 513; *Reed vs. State*, (Miss.) 112 So. 2d 533; *Musselwhite vs. State*, (Miss.) 54 So. 2d 911.

Furthermore, while it is not known by this writer whether the suggestion of error filed by petitioner in the Mississippi Supreme Court was made a part of the record in this Court, that suggestion of error was prepared and filed by William L. Higgs, one of counsel of record now in this Court, and no question was raised by him before the Mississippi Supreme Court with respect to the propriety of the instruction now complained of. Here again is an instance in which one of present counsel for petitioner failed to timely raise a question in the Mississippi Court and is now charging Court-appointed counsel with ineffective representation of petitioner on account of having obtained the instruction.

CONCLUSION

Petitioner's entire case as it is presented to this Court is predicated upon ex parte statements of counsel, an affidavit of one of petitioner's counsel and other signed statements referred to as affidavits but not, in fact, sworn to. This Court is not a trier of facts and as Mr. Justice Harlan said in his dissenting opinion in *Douglas and Meyes vs. California*, decided March 18, 1963, No. 34, October Term, 1962, "the kinds of questions that may arise on appeal are circumscribed by the record of the proceedings that led to the conviction; they do not encompass the large variety of practical and strategic problems that must be resolved at the trial."

Also, on March 18, 1963, this Court decided the cases of *Fay vs. Noia*, No. 84, and *Townsend vs. Sain*, No. 8. In these cases it was made very plain that this Court will not grant relief in such a case as this and that petitioner's relief, if any, should come from a Federal District Court in a habeas corpus proceeding, that court and that court only having the power the receive evidence and try the facts. In the case at bar there appears to be an unresolved factual dispute. As Mr. Chief Justice Warren stated in *Townsend vs. Sain*, "where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. Questions of credibility, of course, are basic to resolution of conflicts in testimony. To be sure the State-Court record is competent evidence, and either party may choose to rely solely upon the evidence contained in that record, but the petitioner, and the State, must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issue."

There is another interesting procedural aspect of this case. Justices Harlan and Stuart observed in *Douglas*

and Meyes vs. California that the conduct of the parties in that case in dismissing their appointed counsel and their efforts to obtain a continuance were designed to delay the proceedings and, in all likelihood, to manufacture an appealable issue. The situation in the case at bar leads one to wonder if that was not done here. In his own affidavit, William L. Higgs, then a practicing attorney in Jackson, Mississippi, stated that petitioner had requested him to represent petitioner when he first saw petitioner and talked to him in the Hinds County Jail in Jackson, Mississippi. This was of necessity prior to the convening of the term of court at which appellant was taken to Canton for arraignment. His failure to appear when court met to represent his client was either from dereliction of duty that he would charge Court-appointed counsel with or from premeditated design to wait until steps had been taken toward the trial of petitioner and then fabricate just such a false affidavit as he has made after the case had run its course through the Courts of Mississippi.

Wherefore, it is respectfully submitted that the petition herein should be dismissed.

Respectfully submitted,

JOE T. PATTERSON, Attorney General

G. Garland Lyell Jr.

BY: G. GARLAND LYELL, JR.
Assistant Attorney General
New Capitol Building
Jackson, Mississippi

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General of the State of Mississippi, do hereby certify that I have mailed a copy of the foregoing Brief for Respondent to counsel of record as follows:

Messrs. Melvin L. Wulf & Roland Watts
156 Fifth Avenue
New York 10, New York
Mr. Morris B. Abram
575 Madison Avenue
New York, N. Y.

by U. S. Mail, Postage Prepaid, by depositing same in the U. S. Mail Box in the New Capitol Building in the City of Jackson, Mississippi.

This 11th day of April A. D., 1963.

G. Garland Lyell Jr.

Assistant Attorney General

APPENDIX

No. 667

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1962

WILLIAM L. SMITH, JR. ..... Petitioner

vs.

STATE OF MISSISSIPPI ..... Respondent

AFFIDAVIT

I, L. F. Hendrick, of Jackson, Hinds County, Mississippi, make the following statement:

I am one of the judges for the Seventh Circuit Court District, State of Mississippi, and have been since September, 1954. Prior to that date I was a practicing attorney, having been admitted to the Bar in June, 1920. I am sixty-eight years of age.

A copy of the Brief for Petitioner in the above styled and numbered case has been furnished me, and my attention has been directed to the affidavit of William L. Higgs, appearing as part of the appendix on page 53. The only thing true about the affidavit, which has reference to me, is that Mr. Higgs called me over the telephone.

The facts are:

1. The September term of the Circuit Court of Madison County, Mississippi convened in Canton on Monday, September 18, 1961. A grand jury was drawn, sworn

and charged. One of the cases to be investigated was the charge against William Smith. I was informed that he did not have an attorney of his selection. On that date, September 18, 1961, I appointed Mr. Jack M. Greaves of the Madison County Bar to represent William Smith. Mr. Greaves is an attorney of many years experience. He is one of the most successful lawyers in criminal cases in that section of the State.

2. The grand jury returned indictments in open court on Wednesday, September 20, 1961. There was one against William Smith.

3. On Thursday, September 21, 1961 the indicted defendants were arraigned. Before the indictment was read to Smith and before any steps of arraignment were taken and before a plea, I inquired of him if he had his own attorney and if he could get one. His answer was "No." I told him that it was my duty to appoint one and that I had appointed Mr. Greaves, who stood with him on arraignment. After arraignment, as is the practice in this court, the case was set for call on September 22, 1961. Then, on September 22, 1961, Mr. Greaves made a motion for a special venire, which was granted.

4. On Friday, September 22, 1961, as I was getting ready to draw the special venire in open court on the second floor of the courthouse building, a message came that there was an emergency telephone call for me in the clerk's office on the first floor. I went immediately. It was Mr. Higgs calling me from Jackson. He stated that he had been contacted to represent William Smith. I told him that the venire was about to be drawn, returnable on Monday, September 25th; that if he was representing or going to represent Smith that it was his duty to come to Canton immediately and take whatever action

he thought necessary; that I had appointed Mr. Greaves; that I could not try any part of the case over the telephone. I did not tell Mr. Higgs that he had no business in the case. I did not assert, either in words or implication, that it would be dangerous for him to take the case. I did not make any personal threat to Mr. Higgs or any other kind of threat. There was no reason for Mr. Higgs to feel that his life would be in danger—if he is sincere in such statement. The atmosphere in Canton was not emotion-charged.

As a matter of fact, when Mr. Higgs called me I fully advised him of the status of the case, that the special venire was about to be drawn and that the case was set for trial on the merits the following Monday. After the conversation Mr. Higgs had ample time to come the short distance from Jackson to Canton, a distance of twenty-two miles, before I had finished drawing the special venire, but he did not appear in court on that date, on the date the case was tried on the merits nor on any other date when there were any proceedings had in connection therewith. While the presence of an attorney is not necessary nor expected while a venire is being drawn, Mr. Higgs had ample time, approximately an hour, to get to the courthouse in Canton before the drawing was concluded and the names, addresses, etc. of the veniremen called out and listed by the clerk. Furthermore, Mr. Higgs could have at any time obtained a list of both the regular and special venire which, so far as I know, he never requested.

/S/ L. F. HENRICK

STATE OF MISSISSIPPI
COUNTY OF HINDS

Personally appeared before me, the undersigned authority in and for said State and County, L. F. Hendrick,

personally known to me, who, after being by me first duly sworn, stated on oath that the foregoing statement is true and correct.

SWORN TO AND SUBSCRIBED before me on this 6th day of April, A. D., 1963.

/S/ H. T. ASHFORD, JR.
Circuit Clerk

IN THE COUNTY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISS.

STATE OF MISSISSIPPI
COUNTY OF HINDS

AFFIDAVIT

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, S. B. BARNES, Deputy Chief of Police in and for the City of Jackson, County of Hinds, State of Mississippi, who being by me first duly sworn, on oath states that heretofore, beginning on or about January 10, 1963, to and including January 30, 1963, that William L. Higgs, an adult male person, did wilfully and unlawfully contribute to the delinquency of William McKinley Daywalt, III, a minor male person of the age of 16 years, in that he took and harbored said minor child in his home in the First Judicial District of Hinds County, Miss., thereby aiding and encouraging said minor child from returning to or communicating with his parents, William McKinley Daywalt, Jr., and Betty Daywalt, then residents of Lewis Road, Route 2, Collegeville, Pennsylvania, and further, by wilfully and unlawfully seducing and persuading said minor child to permit him, the said William L. Higgs, to gratify his lust by indulging in acts of unnatural and

perverted sex acts, including on several days during the period of time aforesaid, unnatural intercourse by the commission of acts of sodomy per anus and numerous acts of sodomy per os; and further, by subverting the morals of said child, keeping said minor child in clothing, food, shelter and medical attention, with the express purpose of causing said child to continue participating with him in said unlawful acts, contrary to Section 7185-13 of Mississippi Code of 1942, and against the peace and dignity of the State of Mississippi.

/S/ S. B. BARNES

Sworn to and subscribed before me, this the 1st day of February, 1963.

/S/ H. T. ASHFORD, JR.
Circuit Clerk

STATE OF MISSISSIPPI
COUNTY OF HINDS

Personally appeared before me, the undersigned authority Russel D. Moore III, Judge of the County Court of Hinds County, Mississippi, S. B. Barnes, who having been first duly sworn by me on his oath says that the matters and things set forth in the affidavit appearing on the reverse side hereof are true and correct as therein stated.

/S/ S. B. BARNES

SWORN TO and subscribed before me, this the 14th day of February, 1963.

/S/ RUSSEL D. MOORE, III
Judge of the County Court of
Hinds County, Mississippi

"We, the Jury, find the defendant guilty as charged."

IN THE COUNTY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 13,594

STATE OF MISSISSIPPI

VS.

WILLIAM L. HIGGS

JUDGMENT

This cause this day came on for hearing on affidavit filed on the 1st day of February, 1963, charging the Defendant William L. Higgs with the commission of the crime of contributing to the delinquency of a minor, and a warrant for his arrest issued thereon and having been served upon him personally, and, the Defendant having been placed under arrest and in custody posted bond conditioned on his appearance on the 11th day of February, 1963, and there remain from that day until discharge by the Court. That Counsel for the Defendant requested on behalf of the Defendant a trial on the merits to be set on the 14th day of February, 1963, and that upon said date, the State of Mississippi having announced ready for trial in open Court, the Defendant defaulted and failed to appear and having been called three times in open Court entered not his appearance either personally or by counsel, the State of Mississippi, by and through the District Attorney moved the Court to try the Defendant William L. Higgs in Absentia pursuant to the provisions of Section 2519 of the Mississippi Code of 1942, Recompiled; whereupon the Court directed the clerk hereof to notify the Defendant and his counsel of the Courts intention to pass the cause until 9:00 A.M., February 15, 1963, and the Court set the cause over for trial at said hour and date. Further the Court directed

the President of the Hinds County, Mississippi, Bar Association to assist it in the selection of three qualified and eminent attorneys to represent the Defendant should the Defendant and counsel of his choice fail to appear. That thereafter on February 15, 1963, at 9:00 A. M. in the County Court House of the First Judicial District of Hinds County, Mississippi, the Court called this cause and the State of Mississippi, announced ready for trial; and whereupon the Defendant was called three times in open Court and defaulted in his appearance either personally or by counsel of his choice. Counsel selected as aforesaid and appointed by the Court to represent the Defendant then appeared in Court and there filed pleadings in the nature of a Motion to Quash the Affidavit and a Motion for Continuance of this cause, which motions, after argument and consideration by the Court, were overruled. A venire being called, vior dire examination of said venire was conducted by Counsel for the State and the Defendant and a jury composed of Owens Alexander and eleven others, being 12 good men and true drawn from a body of qualified electors of the First Judicial District of Hinds County, Mississippi was impaneled and the trial of said cause proceeded on its merits. Thereafter the jury heard the testimony and evidence and having been given written instructions as to the law and heard argument of Counsel for State and Counsel for Defendant retired to the jury room and deliberated to consider their verdict and presently returned in open court and the following verdict was rendered, to-wit:

"We, the Jury, find the Defendant guilty as charged." Whereupon the Court sentenced the Defendant to serve six months imprisonment in the County Jail and to pay a fine in the amount of $500.00 and all costs of this cause.

ORDERED AND ADJUDGED this 15th day of February, 1963.

/S/ RUSSEL D. MOORE
County Judge

CERTIFICATE OF JUDGE TO SIGNATURE OF COUNTY COURT

STATE OF MISSISSIPPI,
COUNTY OF HINDS.

I, Russel D. Moore, presiding judge of the County Court, Hinds County of the State of Mississippi, do hereby certify that H. T. Ashford, Jr., Clerk of the County Court in and for the said State and County, whose name is subscribed to the foregoing certificate, attached to the foregoing transcript in the case of State of Mississippi vs. William L. Higgs, is and was at the time of signing of said certificate Clerk of said Count, Court in and for said State and County, duly elected, commissioned, qualified and acting, and that he is the officer authorized by law to make such certificate; And that same is in due form of law and that full faith and credit should be given his official act. And that I am well acquainted with the handwriting of the said H. T. Ashford, Jr., and that the signature signed to said certificate is genuine.

Witness my hand as judge of the County Court of the State of Mississippi, this the 1st day of April, 1963.

/S/ RUSSEL D. MOORE
Judge County Court
Hinds County, Miss.

CERTIFICATE OF CLERK TO SIGNATURE OF THE JUDGE

STATE OF MISSISSIPPI,
COUNTY OF HINDS.

I, H. T. Ashford, Jr., Clerk of the County Court in and for the said State and County, do hereby certify that Russel D. Moore, whose signature is affixed to the within and foregoing certificate is and was at the time of the signing of the same, Judge of the County Court, Hinds County, of the State of Mississippi, duly elected, commissioned, qualified and acting; and that with full faith and credit should be given to his official acts, and that I am well acquainted with the handwriting of said Russel D. Moore and that the signature affixed to the foregoing certificate is genuine.

Witness my hand and seal of the County Court, at Jackson, Miss., this the 1st day of April, 1963.

S/ H. T. ASHFORD, JR.
Clerk County Court
Hinds County, Miss.